IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22/10/2003

Coram

The Hon'ble Mr. Justice P. SATHASIVAM

Writ Petition No. 27299 of 2003
and
W.P.M.P.Nos. 33350, 33351/2003, W.V.M.P.Nos. 2034 and 2039 of 2003.

M/s. B.S.B.K. Private Limited,
represented by its Authorised
Representative Mr. A. Francis S. Raja,
having registered office at
B.S.B.K. House, Nandini Road,
Bhilay, Satiskar State, India. .. Petitioner.

-Vs-

1. The Chief Engineer,
National Highways,
Chepauk, Chennai.

2. The Superintending Engineer,
National Highways, Tirunelveli.

3. G. Venkateswara Rao.

4. The Chief Engineer, (Morth),
Ministry of Road Transport and
Highways, Perivegan Bhavan,
Second Floor, R.N.227,
Sansad Marg, New Delhi. .. Respondents.

Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Mandamus, as stated therein.

For Petitioner :: Mr. M.M. Sundaresh for
Mr. V. Kathiravan

For Respondents 1 and 2 :: Mr. D. Krishnakumar, Special Govt., Pleader

For 3rd respondent :: Mr. K. Doraisami,Senior counsel
for Mr. P.T. Ramkumar

Mr. J. Madanagopal Rao, Senior Central Government

Standing counsel for 4th respondent.

:ORDER

By consent of all the parties, writ petition itself is taken up for disposal. The petitioner has approached this Court to issue a Writ of Mandamus, forbearing the respondents 1 and 2 from taking any final decision or confirming Tender Notice No. 10/2002 J. D.0.2 , dated 24-12-2002 except by permitting the petitioner to participate in the tender system and by considering the tender of the petitioner by suitably extending the last date of submission of tender by another two weeks.

2. The case of the petitioner is briefly stated hereunder:
The petitioner is a construction company dealing in several construction works, particularly in National Highways Works. The second respondent herein in tender Notice No. 10/2002 dated 24-12-2002 called for tenders for construction of major Bridge at N.H. 47, Kerala to Kanykumari border at Kulithurai worth about Rs.1280 lakhs. As per the tender, the entrepreneur has to follow two covering system of technical bid and financial bid. The persons, who are in technical bid will be allowed to participate in the money bid. The petitioner was allowed to purchase the tender schedule on payment of cost and the same was obtained by the petitioner. On 27-2-2003 the petitioner was permitted to participate in the pre-bid conference and at the time of conference, only 7 persons, who were interested in getting the tender schedules after the discussion was made. The last date of tender was fixed as 28-8-2003. The last date was again extended on 3-9-2003 and subsequently it was intimated that the last date for submitting the tender was extended upto 25-9-2003. Their representative went to the office of the second respondent at about 1.30 P.M., since the final time for submitting the tender schedule is 3 P.M. When he got over from the car, a mob more than 40 persons surrounded the representative of the petitioner company and they have grabbed him and taken away the tender schedule from his hands and they have virtually abducted to a hotel and kept under custody upto 2.30 p.m. to prevent them from submitting the tender schedule on the last date. On the same day, the cell phones of the representative were also taken away by the mob. On knowing the said custody, the head office of the petitioner company made a Fax message to respondents 1 and 2 stating that their representative was kept under custody, and they were not allowed to present the schedule before the 2nd respondent. After 3 p.m., their representative was let off and he straight away went to give a complaint before the Commissioner of Police and also to the local Police Station. The petitioner was virtually prevented from submitting tender documents. No doubt, respondents 1 and 2 are trying to confirm the tender in favour of the third respondent. After knowing that the bid of the petitioner is the lowest, they were virtually prevented by the third respondent in presenting their tender schedule. The action of the respondents are violative of the provisions of Transparency in Tenders Act and Rules and the petitioner is deprived of the valuable right of participation in the tender system. Hence the present writ petition.

3. The second respondent-Superintending Engineer, National Highways,

Tirunelveli has filed a counter affidavit wherein it is stated that the Government of India, Ministry of Road Transport and Highways, New Delhi in letter dated 29-11-2002 have accorded approval to take up the Kuzhithurai Bridge at K.M.604/4 of NH 47 (Kerala Border-Kanyakumari Section) on BOT (Build, Operate and Transfer) basis. The tenders for this work was called for by the Superintending Engineer, Tirunelveli under two cover system by fixing the date of tenders as 04-04-2003. Pursuant to the same, 8 reputed and experienced contractors have purchased the tender documents and petitioner was one among them. The site inspection was arranged on 19-02-2003 and the petitioner had also participated in the meeting that was held on 7 -3-2003. The queries and doubts raised by the contractors were clarified. On 5-5-2003 a letter addressed by Kayes Construction requested for the postponement of tender by 15 days and another bidder East Coast Construction India also raised several queries and requested for postponement of tender by 30 days by its letter dated 2-5-2003. The queries and replies were communicated to all the bidders on 10-7-2003 . This necessitated the postponement of tenders and finally the tender date was extended and the same was fixed on 25-9-2003. The Superintending Engineer (NH), Tirunelveli who is the tender inviting authority is fully competent to extend the date of tenders according to exigencies. Further, this was also communicated to all the participants. No such incidents had been taken place in the office premises. The second respondent is not having a fax machine in their office. Whenever any messages addressed to 2nd respondent is received by the P and T Office, it will inform over phone and a staff from the office will collect it from the P and T office. The receipt of said Fax message was informed by the P and T office at 4.30 p.m. on 25-9-2003. The petitioner's fax message was received only at 6 p.m. On 25-9-2003 by the office. The 2nd respondent also enquired from police and got confirmed that no complaint has been lodged with the local police in respect of this tenders. Two tenderers have participated in the tender on 25-9-2003. The cover containing the bids of the two tenders who have participated have been opened and taken up for processing. The request of the petitioner to extend the tender date cannot be complied with since the two tenders received were already opened and the request of the petitioner if considered will affect the very sanctity of the tender system.

4. The third respondent has filed a counter affidavit wherein it is stated that he is a registered contractor of National Highways. He is in the line of construction of bridges and road projects for the past 20 years. In response for the tender notice dated 2 4-12-2002, he submitted his tender complying with all the procedural formalities on 25-9-2003. Earlier to the submission of tender, a meeting was held on 7-3-2003 at Kuzhithurai wherein the officials of National Highways clarified the doubts raised by tenderers regarding the project. The allegations made against the third respondent are figment of imagination and there is no basis for the same. If the allegation is really true, nothing prevented them to lodge a complaint to the appropriate authority-local police which is normally expected from a prudent person. The 3rd respondent had not sent any of his men to prevent the officials of the petitioner company in submitting the tender. The allegation is devoid of truth. Because of the interim order by this Court, the possibility of completion of the project is getting delayed which would ultimately lead to escalation in the cost of the project and the ultimate sufferers are the

public. The writ petition is filed only with a view to protract the tender process.

5. Heard Mr. M.M. Sundaresh, learned counsel for the petitioner; Mr. D. Krishnakumar, learned Special Government Pleader for respondents 1 and 2; Mr. K. Doraisami, learned senior counsel for the third respondent;and Mr. J. Madanagopal Rao, learned senior Central Government standing counsel for 4th respondent.

6. The only point for consideration is, whether the petitioner has made out a case for issuance of direction as claimed with reference to the tender notice dated 24-12-2002?

7. There is no dispute that the subject matter of the tender relates to construction of a major Bridge at Kuhithurai at K. M.604/4 of N.H.47 (Kerala border Kanyakumari Section). It is also not disputed that the Government of India, Ministry of Road Transport and Highways, New Delhi, in their letter dated 29-11-2002, have accorded approval to take up the said Bridge on BOT (Build, Operate and Transfer) basis. The tender for this work was called by the Superintending Engineer (NH), Tirunelveli under two cover system by fixing the date of tender as 04-04-2003. As per the tender, the entrepreneur has to follow two covering system of technical bid and financial bid. The persons who are in technical bid will be allowed to participate in the money bid. The said process is called two covering system. The persons, who have succeeded in the system can be the next bidder of financial bid. It is seen from the counter affidavit of the second respondent that pursuant to the tender notification, the following contractors with high reputation and experience have purchased the tender documents. They are:
(1) Keyes constructions, Madurai;
(2) E.C.C.I. Chennai;
(3) Zoom Developers, Mumbai;
(4) L & T, Chennai;
(5) Consolidated Toll Network, Mumbai;
(6) Highway contractors, Cochin;
(7) B.S.B.K. Bhilai;
(8) C. Venkateswara Rao, Cummidipoondi.

Serial numbers 7 and 8 are the petitioner and third respondent respectively who purchased the tender documents. It is also not disputed that as per the tender condition, a site inspection was arranged on 1 9 -2-2003 and the petitioner had also participated in the meeting that was held on 7-3-2003. A pre-bid conference was held on 7-3-2003 at Kuzhithurai. In this meeting all the prospective bidders participated and sought clarification on various issues relating to this work. It is explained in the counter affidavit that as many as 176 queries were raised by the bidders. It is also seen that two contractors, namely, Kayes construction and East Coast construction India requested for postponement of tender by 15 days and 30 days respectively. It is further seen that inasmuch as this being a Government of India work, on getting approval from the Government of India, Ministry of Road Transport, the Superintending Engineer, National Highways communicated the replies to the queries to all the bidders on 10-7-2003. This necessitated the postponement

of tenders originally. The tender date finally was extended and the same was fixed on 25-9-2003. As per the terms of tender notification, the tender schedule has to be submitted before 3 p.m. It is the claim of the petitioner that on 25-9-2003, their representative went to the office of the Superintending Engineer, National Highways, Tirunelveli, 2nd respondent herein at about 1.3 0 p.m. When he got over from the car, a mob of more than 40 persons, who were arranged at the instance of the third respondent, surrounded the representative of the petitioner company, took away the tender schedule from his hands and abducted him in a hotel. The above statement in the affidavit and the assertion of the counsel for the petitioner before this Court are seriously disputed by respondents 2 and 3. In the counter affidavit filed by the Superintending Engineer, National Highways as well as the third respondent-G. Venkateswara Rao has specifically denied and as a matter of fact, the Superintending Engineer has categorically stated that no such incident had taken place within his office premises. Mr. M.M. Sundaresh, learned counsel for the petitioner, by drawing my attention to the complaint dated 25-9-2003 to the Commissioner of Police which finds a place at page Nos.2 and 3 of the typed-set of papers, vehemently contended that the petitioner' s representative was forcibly prevented at the instance of the third respondent from submitting the tender schedule before 3 p.m on 25-9-2 0 03. A perusal of the said complaint shows that it was addressed to the District Collector-cum-District Magistrate, Tirunelveli Town, marking a copy to the Commissioner of Police, Tirunelveli. Though it is stated that a complaint was made to local police, admittedly, no such copy was produced before this Court. As a matter of fact, the superintending Engineer in his counter affidavit has specifically stated that no complaint had been lodged with local police in respect of the tender in question (vide para 11 of his counter affidavit). Though it is the claim of the petitioner that a Fax message was sent from the head office, it is the claim of the 2nd respondent that they do not have any Fax machine in their office. He also explained that fax messages are received in P and T Office and whenever any message addressed to them is received by P and T Office, it will inform over phone and a staff from their office will collect it from the P and T Office. It is their further case that the receipt of the said fax message was informed by the P and T office only at 4.30 P.M on 25-9-2003 and the fax message was in fact received only at 6 P.M on 25-9-2003 by their office. This shows that the 2nd respondent was not informed about the incident before 3 P.M. as claimed by the petitioner. Another important aspect to be considered is that in the affidavit, particularly in para 6, the petitioner has stated that the representative of the petitioner company went to the office of the 2nd respondent at about 1.30 P.M. In the message sent to the Superintending Engineer (which finds a place at page 8 of the typed-set of papers), the petitioner company has stated that their General Manager A.K. Sinha along with Mr. Sunil Nair and representative M/s. V. Satya Murthy were sent for submission of tender at the office of the 2nd respondent at 3 P.M. In the reply affidavit filed by the petitioner, again there is reference only to the representative and not the named persons as mentioned in the fax message addressed to the Superintending Engineer. There is no explanation for not mentioning the names of the representatives/ officers of the petitioner company in the affidavit as well as in the reply affidavit filed before this Court. It is also relevant to note that the petitioner company did not file

complaint about the alleged incident in the office premises of the 2nd respondent before the local police or the police officer concerned. It is also pertinent to note that except making a complaint to the Commissioner of Police, admittedly, the petitioner did not pursue the same and in respect of a question from this Court, learned counsel for the petitioner fairly states that they did not follow the said complaint thereafter and that he is not in a position to know the fate of the complaint/ investigation. In the light of the factual details, and in view of the assertion made by the Superintending Engineer, 2nd respondent herein that no such incident had taken place in their office premises as alleged by the petitioner and also of the fact that no complaint had been lodged with the local police in respect of the tender in question, I am satisfied that the petitioner has not substantiated their stand before this Court. It is also relevant to note that the petitioner has failed to get extension of time for submission of tender. As rightly pointed out by the learned Special Government Pleader, Rule 22 (c) of the Tamil Nadu Transparency in Tenders Rules, 2000 , the tenders received subsequent to the prescribed time shall not be opened and the same shall be returned unopened to the tenderer. The said clause has been specifically reiterated in the tender notification. Applying the said clause and the Rules, inasmuch as the petitioner did not submit tender schedule within the prescribed time, I hold that respondents 1 and 2 cannot be prevented in processing the tenders received within the prescribed time.

8. In the light of what is stated above, there is no merit in the claim made by the petitioner; consequently the Writ Petition fails and the same is dismissed. No costs. Connected miscellaneous petitions are closed.

R.B.

Index:- Yes.
Internet: Yes

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